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IN THE

Supreme Court of the United States

October Term, 1964
No. 205

FRANK W. BABCOCK,

Petitioner,

vs.

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court.

BRIEF OF RESPONDENT IN OPPOSITION.

Opinions Below.

The California Supreme Court affirmed the decision of the California Superior Court for Los Angeles County, which had upheld the validity of Los Angeles City Ordinance No. 113,231, by which the Council (the "City Council") of the City of Los Angeles (the "City") adopted the Redevelopment Plan for the Bunker Hill Urban Renewal Project 1B (the "Final Plan") and which had determined that the Final Plan was valid. The intermediate California appellate court, the California District Court of Appeal, had reversed the trial court on the ground that the trial court had

adopted an erroneous position on the scope of judicial review to be accorded to the administrative findings involved.

The opinion of the California Supreme Court is set forth as *In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 37 Cal. Rptr. 74 (1964). The opinion of the California District Court of Appeal is set forth as *Community Redevelopment Agency v. Goldman*, 33 Cal. Rptr. 92 (1963).

Jurisdiction.

There is a defect of jurisdiction over the subject matter of the question sought to be raised by petitioner ("Babcock") in that said question was not advanced as a federal constitutional issue in the trial court, was not asserted before the California appellate courts in Babcock's brief on appeal, was not raised in Babcock's Petition for Rehearing before the California Supreme Court, or otherwise. The question was therefore waived by Babcock and was not considered by the California Supreme Court. There was therefore no federal question regarding right to jury trial "drawn in question" or "specially set up or claimed" to meet the requirements of 28 U. S. C. Section 1257 in the decision which Babcock seeks to have reviewed by this Court [*Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 307-308; *Blair v. Oesterlein Mach. Co.*, 275 U. S. 220, 225]. Additionally, the question raised by Babcock is so foreclosed by prior decisions of this Court [see *e.g., Hardware Dealers' Mutual Fire Ins. Co. of Wisconsin v. Glidden Co.*, 284 U. S. 151, 158] as to be entirely lacking in substantiality [*Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311].

Questions Presented.

The questions presented by Babcock's Petition for Writ of Certiorari are:

1. May the United States Supreme Court exercise jurisdiction over a matter wherein Babcock claims to have been denied his alleged right under the Fourteenth Amendment to the United States Constitution to a jury trial in a civil case: but where Babcock failed to assert this alleged violation of Federal rights before the California courts, thereby waiving said contention under California procedure, and the question of said alleged violation of Federal rights was not considered by the California trial or appellate courts?

2. Assuming that this Court will consider the question raised in Babcock's Petition, was Babcock deprived of any right guaranteed by the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

On March 31, 1959, the City Council adopted Ordinance No. 113,231 which approved and adopted the Final Plan. Thereafter, on June 24, 1959, petitioner filed a complaint containing nine alleged causes of action. These alleged causes of action included five which were equitable, or equitable in nature [Alleged Causes One, Three, Five, Seven and Nine, C. T. pp. 225-239; Resp. Br. below, pp. 271-274].

On April 11, 1960, Babcock's action was ordered consolidated for purposes of trial with five other actions including a special proceeding brought by respondent The Community Redevelopment Agency of the City of Los Angeles, California (the "Agency")

to obtain a determination of the validity of the Final Plan and the bonds to be issued thereunder [C. T. p. 541].

At the trial, the trial court, under established California practice (See Resp. Br. below, pp. 270-276) tried the equitable issues first without a jury. It determined that the Final Plan and Ordinance No. 113,231 were valid. Since Babcock's alleged causes of action for slander of title and interference with contract depended on the invalidity thereof, there was nothing to be tried before a jury [*In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 47, 37 Cal. Rptr. 74 (1964)].

Babcock appealed from the trial court's decision, which appeal was first heard by the California District Court of Appeal. The District Court of Appeal reversed the trial court on the ground that the trial court had not accorded the administrative findings the proper scope of review [*Community Redevelopment Agency v. Goldman*, 33 Cal. Rptr. 92 (1963); Appendix A to Petition for Writ of Certiorari].

The California Supreme Court granted the Agency's Petition for Hearing, and affirmed the trial courts' judgments [*In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 37 Cal. Rptr. 74 (1964)].

Babcock did not assert before either the trial court, the District Court of Appeal or the California Supreme Court that the trial court's denial of a jury trial violated Babcock's rights under the United States Constitution, [see C. T., esp. p. 605, line 31, to p. 606, line 2; esp. pp. 1037-1039; and App. Op. Br. pp. 7, 19-21, and Pet. for Rehear. pp. 5-6 filed below on behalf of Babcock].

ARGUMENT.

A. Babcock Failed to Assert Before the California Courts the Alleged Violation of Rights Under the United States Constitution Set Forth in His Petition. Said Contention Was Therefore Deemed Waived Under California Law, and Was Not Considered by the California Courts. The Alleged Federal Question Will Therefore Not Be Considered by This Court.

It is well-settled under California practice that unless modified, the Pre-Trial Order in a case controls the issues which may be tried, and that questions not raised in the trial court will not be considered on appeal [Rule 216 (formerly Rule 8.8), Judicial Council Rules for the Superior Courts; *Everly Enterprises, Inc. v. Altman*, 54 Cal. 2d 761, 765-766, 8 Cal. Rptr. 455 (1960); *Baird v. Hodson*, 161 Cal. App. 2d 687, 690, 327 P. 2d 215 (1958); and *Jenner v. City Council*, 164 Cal. App. 2d 490, 498, 331 P. 2d 176 (1958)]. This includes constitutional issues [*Hershey v. Reclamation District No. 108*, 200 Cal. 550, 564; 254 Pac. 542; *Jenner v. City Council, supra*].

As stated in 3 Cal. Jur. 2d, Appeal and Error, Section 140,

> "It is a general rule of appellate review, early established and long adhered to, that questions not raised in the trial court will not be considered on appeal."

The Pre-Trial Order in the trial court incorporated the Joint Pre-Trial Statement for the statement of issues [C. T. pp. 585-588]. This order reserved ruling on Babcock's demand for jury trial [C. T. p. 586]. The question of whether or not Babcock was entitled

to a jury trial was not stated in terms of a federal question. No assertion was made in the Joint Pre-Trial Statement that denial of a jury trial would violate any federal right of Babcock [C. T. pp. 598-614, esp. p. 605, line 31, to p. 606, line 2]. No attempt was made by petitioner to modify or amend the Pre-Trial Order.

No assertion was made to the trial court that its action with respect to the jury trial request was violative of any federal rights of Babcock [See esp. R. T. pp. 1037-1038].

Babcock failed to assert before the California appellate courts that the action of the trial court in denying Babcock a jury trial, or the California Supreme Court's action in affirming that decision, was violative of any federal rights of Babcock [See App. Op. Br. pp. 7, 19-21, and Pet. for Rehear. pp. 5-6 filed below on behalf of Babcock].

Additionally, had the question been raised in the trial court of whether or not the trial court's action deprived Babcock of a jury trial to which he was allegedly entitled under the Fourteenth Amendment to the United States Constitution, Babcock's failure to assert that point in his opening brief on appeal would, under long-settled California practice, be deemed as a waiver and abandonment of the issue, and would not be considered by the California appellate courts [*Roberts v. Krafts*, 141 Cal. 20, 25, 74 Pac. 281 (1903); *Mayne v. San Diego Elec. Ry. Co.*, 179 Cal. 173, 179, 175 Pac. 690 (1918); *Wheeling v. Financial Indemnity Co.*, 201 Cal. App. 2d 36, 44-45, 19 Cal. Rptr. 879 (1962)].

Since the federal question was not presented to the California Supreme Court, it did not pass thereon [*In*

re Redevelopment Plan For Bunker Hill, 61 Adv. Cal. 1, 47, 37 Cal. Rptr. 74 (1964)].

The ground of jurisdiction asserted by Babcock is 28 U. S. C, Section 1257(3), "whereby any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

Quite clearly, no such title, right, privilege or immunity was "specially set up or claimed" under the United States Constitution before the California courts.

Had the question been raised before the California appellate courts, the failure to raise it before the trial court would appear fatal in view of California practice [*Bailey v. Anderson*, 326 U. S. 203, 206-207; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 308].

Had the question been raised in the trial court, the failure to raise the question before the California appellate courts would likewise create a defect of jurisdiction [*Hulbert v. Chicago*, 202 U. S. 275, 280-281; *C.I.O. v. McAdory*, 325 U. S. 472, 477].

The total failure to raise the question before the California courts defeats jurisdiction [*Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 307-308, 310-311; *Beck v. Washington*, 369 U. S. 541, 549-552; *Michigan Sugar Company v. Michigan*, 185 U. S. 112, 113-114; *California Powder Works v. Davis*, 151 U. S. 389, 393].

Babcock did assert that he was entitled to a jury before the California courts. However, this assertion was not made with reference to any federal treaty, statute or the United States Constitution and is therefore presumed to refer to California law or the California constitution [*Miller v. Cornwall R.R. Co.*, 168

U. S. 131, 134; *Harding v. Illinois*, 196 U. S. 78; *Bowe v. Scott*, 233 U. S. 658, 664-665; *Thomas v. Iowa*, 209 U. S. 258, 263].

It is therefore submitted that no basis for the exercise of jurisdiction by this Court is present upon the record herein.

B. Assuming, Arguendo, That This Court Will Consider the Matter, It Is Well-Established That the Fourteenth Amendment to the United States Constitution Does Not Guarantee a Jury Trial in State Court Civil Actions.

The uniform rule of decision has long been that neither the Seventh nor Fourteenth Amendments to the United States Constitution guarantee or require a jury trial in state court civil actions, but rather, that trial by jury in civil actions in state courts may be modified by a state or abolished altogether [*Walker v. Sauvinet*, 92 U. S. 90; *Maxwell v. Dow*, 176 U. S. 581; *New York Central Ry. Co. v. White*, 243 U. S. 188; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U. S. 226; *Hardware Dealer's Mutual Fire Ins. Co. of Wisconsin v. Glidden Co.*, 284 U. S. 151, 158; *Olesen v. Trust Co. of Chicago*, 245 F. 2d 522, 524 (7th Cir. 1957), *cert. den'd.* 355 U. S. 896].

Petitioner asserts that the decision in *Malloy v. Hogan*, ... U. S. ...., 12 L. Ed. 2d 653 (1964), has overturned the above rule. However, the *Malloy* case decided only that the protection against self-incrimination of the Fifth Amendment to the United States Constitution was made applicable to the states through the Fourteenth Amendment to the United States Constitution. The majority opinion expressly rejected the

proposition that the first eight amendments were incorporated into the Fourteenth Amendment.

The considerations before this Court in *Malloy* are not present in cases involving the Seventh Amendment. A private litigant in a suit at common law involving more than twenty dollars would not appear to be denied the benefits of a free society if his case were not heard before a jury.

Conclusion.

It is submitted that Babcock's failure to rest his contentions with respect to a jury trial on a federal ground before the California courts creates a fatal jurisdictional defect as to his Petition.

Additionally, the right to a jury trial in a state civil action which he asserts has never been recognized by this Court or any other as being within the guarantees of the United States Constitution.

It is therefore respectfully submitted that Babcock's Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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